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No. 82-1487

IN THE
Supreme Court of the United States

Spring Term 1983

ROBERT P. HERZOG, RECEIVER OF
D. H. OVERMYER CO., INC. (OHIO) *ET AL.*, *Petitioner*

v.

THE FIRST NATIONAL BANK OF BOSTON, *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIRST CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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April 11, 1983

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Respondent's Memorandum Opposing Certiorari raised an issue not raised in the Petition for Certiorari. Respondent claims, at the bottom of page 2 of its Memorandum, that "[t]here is an additional reason why issuance of the writ should not be contemplated here." Respondent then asserts that "the claims of 'the Overmyer entities' have been *fully* presented in a trial", in Ohio, which has "effectively mooted the sole reason advanced . . ." in this case. Petitioner argued the exact opposite in the Court of Appeals and both parties briefed the issue. That court did not reach the issue, stating, in its opinion at page 10, that it is "neither necessary nor appropriate to reach any question with respect to the impact of the Ohio bankruptcy decision. . . ."

The issue of the Ohio decision is therefore not before this court.

As to the sardonic footnoted comments of Respondent in its Memorandum at page 2, regarding the applicability of the Federal Bankruptcy Act or the 1978 Bankruptcy Code to the responsibilities of a Debtor in Possession, this is a distinction without a difference. The Federal Bankruptcy Act provision, 11 U.S.C. 742, stated:

Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this title, subject, however, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe.

Both the old and new sections place the Debtor in Possession in the shoes of a trustee, subject to control of the court. That is the point made in the Petition for Certiorari.

Respectfully submitted,

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